Decision No. R13-1119-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0145E

LA PLATA ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; WHITE RIVER ELECTRIC ASSOCIATION, INC.; BP AMERICA PRODUCTION COMPANY, ENCANA OIL & GAS (USA), INC., ENTERPRISE PRODUCTS OPERATING LLC, AND EXXONMOBIL PRODUCTION COMPANY AS MEMBERS OF THE RURAL ELECTRIC CONSUMER ALLIANCE; AND KINDER MORGAN CO_2 COMPANY, LP,

COMPLAINANTS,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE PAUL C. GOMEZ DENYING MOTION TO DISMISS AND CERTIFYING INTERIM DECISION AS IMMEDIATELY APPEALABLE

Mailed Date: September 11, 2013

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I. STATEMENT

A. Background

1. Complaint

1. On March 4, 2013, La Plata Electric Association, Inc. (La Plata) and Empire Electric Association, Inc. (Empire), acting on behalf of themselves and their members; White River Electric Association, Inc. (White River), acting on behalf of itself and its members; the Rural Electric Consumer Alliance (Industrial Complainants), which consists of BP America Production Company (BP), Encana Oil & Gas (USA), Inc. (Encana), Enterprise Products Operating LLC (Enterprise), and ExxonMobil Power and Gas Services Inc., on behalf of ExxonMobil Production Company, a division of ExxonMobil Corporation (Exxon); and Kinder Morgan CO_2 Company, L.P., as industrial customers of the above mentioned cooperative electric associations (collectively, Complainants), pursuant to 4 *Code of Colorado Regulations* (CCR) 723-1-1302 of the Commission's Rules of Practice and Procedure, filed a Formal Complaint which initiated this proceeding before the Colorado Public Utilities Commission (Commission).

2. The Formal Complaint alleges that Tri-State Generation and Transmission Association, Inc. (Tri-State or Respondent) imposed a new rate referred to as "A-37" implemented on January 1, 2013 which replaced the previously effective "A-36" rate. Complainants allege that the A-37 rate resulted in a dramatic increase in rates for high load factor distribution cooperatives and high load factor customers without regard to the cost of providing

service. Further, Complainants allege that the A-37 rate results in a 10 to 18 percent rate increase for high load factory customers and cooperatives that serve high load factor customers based solely on Respondent's new allocation and rate design methodology. Additionally, Complainants allege that the A-37 rate has an added deleterious impact on residential time-of-use customers.

3. Complainants explain that generally, cost allocation and rate design methodology includes two main components. Here however, the demand charges are not collected based on peak demands as before. Instead, demand charges are assessed based exclusively on calculated average demands. Complainants state that an allocation and rate based on a customer's calculated average demand is mathematically equivalent to an allocation and rate based on a customer's energy consumption. Consequently, the A-37 methodology is equivalent to an all-energy allocation and rate which is a method previous rejected by the Commission. Second, Complainants allege that Tri-State has adopted an arbitrary on-peak/off-peak differential for its wholesale energy rates at a ratio of 4 to 1, which when coupled with the calculated average demand, collapses to an all-energy rate and results in an on-peak/off-peak differential of only 1.4 to 1 ratio which is insufficient to provide the proper price signals to retail customers to encourage them to shift load to off-peak periods.

4. Complainants argue that the cumulative effect of the A-37 methodology is a significant increase in rates for high-load factor distribution cooperatives and high-load factor member-customers, and a simultaneous lowering of rates for low-load factor distribution cooperatives and low-load factor customers without regard to the cost of providing service.

5. Complainants make the following claims regarding Tri-State: that it failed to file its A-37 rate with the Commission pursuant to § 40-3-103, C.R.S., including schedules showing all rates collected together with all rules, regulations, and contracts that in any manner affect or

relate to its rates; that it failed to provide 30 days' notice pursuant to § 40-3-104, C.R.S., of the A-37 rate, and failed to seek a waiver of that requirement; that the A-37 rate cost allocation and design is unjust and unreasonable pursuant to §§ 40-3-101 and 40-3-111(1), C.R.S.; and that the A-37 rate is preferential or discriminatory pursuant to §§ 40-3-106(1), 111(1) and 111(4)(a), C.R.S.

6. As a result, Complainants seek review by the Commission of the new cost allocation and rate design methodology as applied to Tri-State's tariff rates to its Colorado member-systems and their retail customers. Complainants also seek to prohibit Tri-State from charging the A-37 rate from January 1, 2013 until such time as Tri-State complies with §§ 40-3-103 and 104, C.R.S., and puts its rates on file with the Commission. Complainants request a Commission Decision under §§ 40-3-101 and 102, C.R.S., finding that Tri-State's cost allocation and rate design methodology implemented on January 1, 2013 is unjust, unreasonable, preferential, and discriminatory. Additionally, Complainants request a Commission Decision under §§ 40-3-101 and 102, and §§ 40-3-111(1) and (2)(a), C.R.S., establishing a cost allocation and rate design methodology for Tri-State that is just, reasonable, not preferential and not discriminatory, as well as a Decision requiring Tri-state to pay an appropriate refund to any cooperative that was billed under the A-37 rate higher than it would have been billed under the A-36 rate, as well as any additional or other relief the Commission deems appropriate.

7. On March 15, 2013, Commission Director Mr. Doug Dean served Tri-State with an Order to Satisfy or Answer requiring it to satisfy the matters in the Complaint or answer the Complaint in writing within 20 days from service upon Respondent of the Order. In addition, Respondent was served with an Order Setting Hearing and Notice of Hearing. That Order set this matter for an evidentiary hearing on May 22, 2013.

8. On March 21, 2013, at its regular Weekly Meeting, the Commission, by minute entry, referred this Formal Complaint to an Administrative Law Judge (ALJ). The matter was subsequently assigned to the undersigned ALJ.

2. Motion to Dismiss

9. On April 4, 2013, Tri-State filed a Motion to Dismiss Formal Complaint (Motion to Dismiss). Tri-State asserts that this Commission is without jurisdiction to hear this Formal Complaint under several theories including that the Commerce Clause[1] prohibits Commission rate regulation of Tri-State and that Commission jurisdiction over its rates would improperly interfere with Tri-State's contracts with its Member Systems. The Formal Complaint should also be dismissed, according to Respondent, since the Commission has never regulated Tri-State's rates and the Commission's rules have recognized that fact for a period of time. While the Formal Complaint requires that the Commission review the retail rates of Tri-State's Member Systems, it argues that the Formal Complaint fails to comply with the process required by statute. Tri-State also asserts that it has not violated any statute or Commission rule. Regarding standing, Tri-State takes the position that the Industrial Complainants lack standing to bring the Formal Complaint and the Complainant Member Systems lack standing to assert Claims Three and Four of the Formal Complaint.

10. Tri-State argues that its integrated, interconnected electrical system operates solely in interstate commerce, integrated into an interstate grid to facilitate the generation and transmission of electricity across its four-state service area (Colorado, Nebraska, New Mexico, and Wyoming). Tri-State represents that its Colorado member systems do not receive electricity

[1] The power is reserved to Congress to regulate commerce among the several states. U.S. Const. art. 1, sec. 8, cl. 3.

solely, or even substantially, from its generation resources located in Colorado. Rather, Tri-State maintains that it injects electricity into the regional grid from its various generation resources located in Arizona, Colorado, New Mexico, and Wyoming, as well as from independent power producers in those states, as part of interstate commerce that serves all of Tri-State's member systems no matter which state those systems are located. Tri-State represents that it depends on the operation of all the generation and transmission facilities in all four of the states in which it operates in order to meet its power sales and service obligations.

11. Because Tri-State operates solely in interstate commerce, it maintains that any Commission regulation of its wholesale rates would represent a *per se* violation of the Commerce Clause because it has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of Colorado even though the commerce may have effects within Colorado. Tri-State takes the position (more fully addressed *infra*) that since it is involved solely in interstate commerce, the effects of state regulation on interstate commerce are not merely incidental, but are rather significant and substantial due to the economic protectionism present in this proceeding.[2] As an example, Tri-State asserts that were this Commission to suspend the A-37 rate (or rate design) in whole or in part, and that a lower rate or different rate design should be applied to Tri-State's Colorado member systems, this would force Tri-State to increase its wholesale rate to its member systems in Nebraska, New Mexico, and Wyoming.

12. Tri-State also points to various Commission Decisions issued over the years for the proposition that the Commission has recognized that it lacks jurisdiction over Tri-State's

[2] Tri-State argues that because it owns and operates assets in five different states and provides wholesale electric service in four states, each of those states would have an interest in ensuring that its rates were the lowest in the Tri-State system, which would ultimately result to disallowance of full cost recovery for Tri-State.

rates and charges. Tri-State asserts that this recognition of lack of Commission oversight has appropriately existed since 1975.

13. In addition, Tri-State takes the position that Colorado Public Utilities Law (*see*, Articles 1 through 7 of Title 40, Colorado Revised Statutes) supports the conclusion that generation and transmission cooperatives (G&Ts) such as Tri-State are not subject to Commission regulation. Tri-State cites to § 40-2-112(2), C.R.S., which states that nonprofit G&Ts may be subject to less regulation and no rate regulation by the Commission. As well, Tri-State notes § 40-7-113.5, C.R.S., which exempts G&Ts from Commission authority to impose civil penalties for violations of the Public Utilities Law.

14. As regards the participation of the Industrial Complainants, Tri-State argues that they are not member systems of Tri-State and do not receive retail electric service from Tri-Sate. Rather, the Industrial Complainants receive electric service from Tri-State's member systems which set their own retail rates independent of Tri-State and provide notice to their own customers such as the Industrial Complainants of any changes to those retail rates. Since the Complainant member systems have each voted to exempt themselves from Commission jurisdiction under § 40-9.5-103, C.R.S., the Industrial Complainants are precluded from indirectly creating Commission jurisdiction where none exists, since the Commission has no authority over the retail rates of the Complainant member systems.

15. Tri-State also claims that is has not violated any applicable provision of Colorado Public Utilities Law or the Commission's regulations. Tri-State enumerates the statutes under which Complainants argue that Tri-State is in violation and counters that it is not in violation of any of the statutes. Tri-State indicates that it has not violated § 40-3-103, C.R.S., because the Commission has no rules pursuant to § 40-3-103, C.R.S., which require G&Ts such as Tri-State

to provide and keep on file with the Commission documents such as its current Colorado tariffs, forms of contracts, and electric service agreements.[3]

16. Tri-State further asserts that it has not violated § 40-3-104, C.R.S., or Rule 3109 of the Commission's Rules Regulating Electric Utilities 4 CCR 723-3, which require a utility to file a new or changed tariff with the Commission. Tri-State argues that Rule 3109 is not applicable to G&Ts such as Tri-State, nor is § 40-3-101, C.R.S., implemented through Rules 3108, 3109, and 3110. Tri-State goes on to state that it has also not violated §§ 40-3-106(1) and 111(1), C.R.S., which are implemented through Rules 3108 through 3110 since those rules are not applicable to Tri-State. Additionally, because the "postage stamp" rate Tri-State charges to all its member systems is uniform, there is no distinction among customers and since the rate is charged uniformly, no preferential or discriminatory treatment exists. To the extent the A-37 rate affects Tri-State's member systems differently based on load characteristics, Tri-State argues that this does not equate to preferential or discriminatory rates or an "unreasonable difference."

17. Finally, Tri-State maintains that it has not violated § 40-6-111(4), C.R.S., since the Commission lacks authority to suspend Tri-State's wholesale rates. Because § 40-6-111(4), C.R.S., does not provide a different or independent basis for relief from §§ 40-3-106(1) or 111(1), C.R.S., then the same Commission Rules (3109 through 3110) are applicable to § 40-6-111(4), C.R.S., as to §§ 40-3-106(1) and 111(1), C.R.S.

18. Tri-State contends that Commission regulation of Tri-State's wholesale rates would interfere with Tri-State's wholesale electric service contracts with its member systems.

[3] Tri-State points to Commission Rule 4 *Code of Colorado Regulations* 723-3-3108 of the Commission's Rules Regulating Electric Utilities which require utilities to keep those documents on file regarding their retail electric service.

Tri-State describes the rate setting process its board of directors (BOD) implements in setting new rates. Tri-State's mission according to the company is to provide its member systems with electricity at the lowest reasonable price on a basis of mutuality, which provides Tri-State with the incentive to keep rates as low as possible based on its cooperative business model. In addition, each member system in Colorado has a representative on the BOD who was able to vote on the A-37 rate which allowed member systems to fully participate in the democratic process of rate setting. Because each Tri-State member system has entered into a wholesale electric service contract which obligates them to pay the rates duly adopted by Tri-State's BOD, Tri-State Contends that Complainant member systems seek to avoid their contractual obligations by improperly invoking Commission jurisdiction here to interfere with those contractual obligations.

19. In addition, Tri-State argues that the Industrial Complainants lack standing to bring the claims asserted. According to Tri-State, the Industrial Complainants have suffered no actual injury-in-fact which is "sufficiently direct and palpable: to present the Commission with fair assurance that the case is proper for Commission resolution." Tri-State maintains that this is so because it provides wholesale electric service to its Colorado member systems and not directly to the Industrial Complainants. In addition, Tri-State takes the position that it has nothing to do with the rate **design that its member systems utilize to charge retail rates. Consequently, the rate design implemen**ted by the member systems providing electric service to the Industrial Complainants further distances Tri-State from the alleged injury.

20. Tri-State notes that the Complainants assert § 40-6-108(1)(b), C.R.S., for Claims Three and Four, and § 40-6-111(4). C.R.S., for the Fifth Claim which provide them standing. Industrial Complainants have no legally protected rights or cognizable interests involved in

Claims Three, Four, and Five, while the Complainant member systems have no legally protected rights or cognizable interests in Claims Three and Four, according to Tri-State.

21. Regarding the § 40-6-108(1)(b), C.R.S., source of the claim for standing for Claims Three and Four, Tri-State indicates that the statute requires the signature of at least 25 customers of Tri-State for standing to bring a claim under that statute. Because the Industrial Complainants are not customers of Tri-State, they are therefore without standing. Another infirmity pointed out by Tri-State as to standing under § 40-6-108(1)(b), C.R.S., is that legal counsel for Complainants signed the Complaint rather than actual customers as required by the statute. Further, § 40-6-108(1)(b), C.R.S., was not meant to apply to G&Ts since it only has 18 Colorado member systems.

22. As to § 40-6-111(4)(a), C.R.S., Tri-State maintains that since the Industrial Complainants are not members or customers of Tri-State, they therefore lack standing to assert the Fifth Claim. As such, Tri-State argues that the Complainants have no standing to bring the Third and Fourth Claims of the Complaint, and the Industrial Complainants lack standing to bring Claim Five.

3. Complainants' Response to Motion to Dismiss

23. Complainants argue that the Commerce Clause does not preclude Commission jurisdiction over Tri-State in this Complaint. Complainants argue that Commission jurisdiction is not invalid *per se* because economic protectionism is not present here since Complainants have not asked for Colorado rates to be lower than those of other states or that other states should be asked to pay more than their fair share of the percentage of Tri-State's revenue requirements.[4]

[4] In addition, Complainants argue that Tri-State does not allege that the underlying statutes or rules discriminate against out-of-state suppliers on their face, or that any in-state competitors are subject to more lenient treatment or special benefits under Colorado statues or rules.

Rather, since Colorado statutes and Commission rules apply equally to interstate and intrastate utilities providing services in Colorado, there is no economic protectionism.

24. Complainants go on to state that no state action exists here that would directly control commerce occurring wholly outside the boundaries of Colorado, which is also an indication that the assertion of Commission jurisdiction here is not invalid *per se*. Complainants also describe Tri-State's electric offerings as having a strong intrastate component, as well as being subject to Commission jurisdiction in several contexts presumably based on Colorado law and Colorado state interests.

25. Given Tri-State's representations that its facilities are so interlinked that its wholesale sales in Colorado are necessarily done in interstate commerce, then by Tri-State's own logic, any Commission ruling would have to impact Colorado, as part of its interstate network. As a result, there can be no *per se* violation based on solely extraterritorial impact in this proceeding.

26. Under a balance test approach, Complainants assert that the Commission may review Tri-State's rate design without violating the Commerce Clause under the *Pike v. Bruce Church* balancing test. This is so because state statutes regulate Tri-State evenhandedly to effectuate a legitimate local public interest, and any effects on interstate commerce are merely incidental. Complainants argue that the Commission regulates the rates of other public utilities that operate in interstate commerce such as Black Hills Corporation and Xcel Energy. Complainants note that the Commission has been able to work with these and other utilities to reasonably accommodate the interstate nature of some of the utilities' operations. Tri-State offers no compelling reason why the Commission could not accomplish the same for it according to Complainants.

27. Complainants also argue that any effects of Commission rate regulation on Tri-State's interstate interests would only be incidental and no more than those experienced by other interstate utilities as Complainants are not seeking a sweeping Commission decision, nor are they asking Tri-State to decrease its overall Colorado rates to the detriment of other states, or objecting to an across the board rate increase as long as it is lawfully established.

28. Because Tri-State has almost 1500 megawatts (MW) of generating capacity in Colorado alone, and sold 9.5 million megawatt-hours of electricity in Colorado in 2012, as well as serving 56 Colorado counties, with extensive high-voltage transmission lines across Colorado, Complainants conclude that the State of Colorado can and does have a particularly strong interest in determining whether Tri-State's rates are discriminatory.

29. While Tri-State pointed out prior Commission decisions for the proposition that the Commission has a significant history of demurring on jurisdiction over Tri-State's rates, Complainants point out that "no one has ever before squarely asked the Commission to assert its statutory jurisdiction over Tri-State's rates or rate design." Nonetheless, Complainants also note that the Commission has asserted jurisdiction over Tri-State in several other contexts. As for the prior Commission decisions cited by Tri-State, Complainants argue that those decisions are inapplicable to the matter at hand and further, the Commission is not bound by *stare decisis* and may depart from prior decisions, when circumstances require.

30. In response to Tri-State's argument that under Colorado Public Utilities Law, G&Ts are not regulated by the Commission, Complainants take the position that the statutes cited by Tri-State, §§ 40-2-112 and 40-7-113.5, C.R.S., are inapplicable since neither deals with the Commission's regulation of a G&T's rates. Complainants assert that Tri-State fails to provide specific statutory support for its position because there is none.

31. Complainants argue that their assertion that Tri-State has violated Colorado law in the manner in which it implemented the A-37 rate states a claim upon which relief can be granted. Although Tri-State insists that it has not violated § 40-3-103, C.R.S. (implemented through Rule 3108) which requires utilities to file their tariffs with the Commission, Complainants find Tri-State's position "strained." It is Complainants' position that the statute does not limit the obligation to only retail rates, but rather requires every public utility to file its rates with the Commission. Consequently, it appears to Complainants that Tri-State is attempting to create an ambiguity where none exists.[5]

32. Regarding Tri-State's contention that it has not violated §§ 40-3-101, 40-3-104, 40-3-106(1), 40-3-111(1), or 40-6-111(4), C.R.S., Complainants again call attention to the specific language of those statutes which indicates that each statute is applicable to every public utility including Tri-State.

33. Complainants also address Tri-State's claim that Commission regulation of its wholesale rates would interfere with Tri-Sate's wholesale electric service contracts with its members. Complainants contend that the Complaint does not involve a contract dispute. Rather, the issue is whether the A-37 rate violates Public Utilities Law prohibiting discriminatory rates. Complainants argue that parties cannot privately contract to abrogate statutory requirements or contravene public policy. As such, the wholesale electric service contracts have no bearing on whether the A-37 rate is discriminatory. Complainants characterize Tri-State's claim that this matter is really a contractual dispute as defenses to the Complainants' claims.

[5] In addition, Complainants note Commission Rule 1210(a)(I) which requires "[a]ll utilities, unless specifically exempted by the Commission" to have current tariffs for their jurisdictional services on file.

34. As for the standing of the Industrial Complainants, Complainants disagree with Tri-State that they have no standing in this proceeding since, as customers of the member systems, they pay retail rates to the member systems rather than Tri-State's wholesale rates, and as such suffer no injury-in-fact. Complainants take the position that pursuant to § 40-6-108(1)(d), C.R.S., the Commission, in its discretion, may entertain a complaint in the absence of direct harm to a complainant. Tri-State's position is belied by the fact that once its costs are incurred by the member systems, there is little that can be done to stop those costs from being passed along to the retail consumers, according to the Complainants, or a member system could risk non-recovery if the member's actual usage does not match the assumptions used in designing wholesale rates. Further, the long term power supply contract between Tri-State and its member systems does not give those system members a viable alternative from whom to purchase their power supply. Complainants also assert that the Industrial Complainants have a legally protected interest to prevent unjust and unreasonable and preferential charges, since those rates are passed through to the retail consumers.

35. In the alternative, even if the Commission finds that the Industrial Complainants lack standing as Complainants on their own, then the Industrial Complainants could move forward with the Complaint as intervenors in this proceeding because the proceeding would substantially affect their pecuniary or tangible interests. The Industrial Complainants meet this standard and the difference between a "complainant" and an "intervenor" in this context is minimal in terms of how the case will proceed.

36. Finally, Complainants address Tri-State's claim that the member systems lack standing as to Claims Three and Four because the complaint was signed by counsel for the three cooperatives rather than the 25 member systems as it argues is required by § 40-6-108(1)(b),

C.R.S. Complainants point out that there are only 18 member systems in Tri-State's Colorado system leading to the conclusion that Tri-State's interpretation that the complaint must be signed by 25 member-systems is that the statute is a nullity, leading to an illogical result contrary to the well-recognized analysis of statutory construction.

37. Complainants take the position that § 40-6-108(1)(b), C.R.S., must be read in conjunction with § 40-6-111(4)(a), C.R.S., which reveals that the legislature intended to give members of customers of cooperative electric associations added protection by easing the requirement to challenge a utility's rate increase.[6] Based on its analysis, Complainants conclude that the only rational reading of § 40-6-108(1)(b), C.R.S., is that the Complainant member systems have standing to bring this Complaint because they represent more than 25 end use customers.[7]

4. Decision on Limited Evidentiary Hearing

38. Because of the nature and extent of the disputed facts regarding the issue of Commission jurisdiction in this complaint proceeding, on May 16, 2013 Interim Decision No. R13-0581-I was issued to hold a limited evidentiary hearing on the disputed facts regarding Tri-State's Motion to Dismiss. In that decision, the ALJ found it appropriate to conduct a limited evidentiary hearing because the jurisdictional facts in this proceeding were in dispute, because the determination of jurisdiction for the Commission to hear this Complaint could not be determined on the face of the pleadings.[8]

[6] *Citing*, *Colo.-Ute Elec. Ass'n v. Pub. Utils. Comm'n*, 760 P.2d 627, 637 (Colo. 1988).

[7] In the event it is found that Complainants lack standing to bring one or more of the claims raised, they urge the Commission to begin an investigation on its own motion to investigate whether the A-37 rate violates Colorado Law.

[8] *Citing*, *Trinity Broadcasting of Denver, Inc. v. City of* Westminster, 848, P.2d 916, 925 (Colo. 1993) (citations omitted); and *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

39. A procedural schedule was adopted by Interim Decision No. R13-0648-I which was issued May 31, 2013, which set deadlines for the filing of direct, answer, and rebuttal testimony, and a limited evidentiary hearing was scheduled for July 29 through 31, 2013. A discovery schedule was also adopted by the Interim Decision.

40. In conformance with the procedural schedule, Complainants filed the direct testimony and exhibits of Dr. Martin J. Blake, a consultant and former commissioner of the New Mexico Public Regulatory Commission.

41. Tri-State filed the answer testimony and exhibits of: Mr. Micheal S. McInnes, Senior Vice President of Production for Tri-State; Mr. Daniel T. Walter, Senior Manager for Energy Markets for Tri-State; Mr. Robert W. Wolaver, Senior Manager of Energy Resources for Tri-State; Mr. James P. Spiers, Senior Vice President of Business Strategy/Chief Technology Officer for Tri-State; Mr. Daniel M. Walker, a financial advisor and consultant with G&T cooperative experience; Mr. John P. Corrigan, a utilities management consultant; and, Dr. Joseph P. Kalt a professor from the Kennedy School of Government, Harvard University.

42. Complainants filed the rebuttal testimony and exhibits of: Mr. Kevin C. Higgins, a consultant specializing in economic and policy analysis applicable to energy production, transportation, and consumption; Dr. Martin J. Blake; and, Mr. Michael P. Gorman, a public utility regulation consultant.

43. At the scheduled date and time, the limited evidentiary hearing was convened. Appearances were entered for Complainants on behalf of Industrial Complainants including BP, Encana, Enterprise, and Exxon, as well as White River, Empire, La Plata, and Kinder Morgan CO_2 Company. Appearances were also entered on behalf of Respondent Tri-State.

44. During the course of the hearing 74 hearing exhibits were either entered into evidence or administrative notice was taken. Those exhibits offered and entered into evidence include Hearing Exhibit Nos. 1 through 11, 27, 29 through 47, 48 through 57, 59 through 61, 64, 65, and 67 through 82. Administrative notice was taken of Hearing Exhibit Nos. 12 through 22.

45. On August 16, 2013, Complainants and Respondent filed their respective Closing Statements of Position.

II. FINDINGS

A. Colorado Public Utilities Law

46. The narrow issue[9] to be determined here is whether the Commission has subject matter jurisdiction to hear the Formal Complaint. The examination of the issue and attendant sub-issues begins with an analysis of the Colorado Public Utilities Law.[10] Complainants' position is that the Commission has subject matter jurisdiction over the Complaint under Colorado law. Tri-State, while conceding that it is indeed a public utility under Colorado law, nevertheless argues that the Commission lacks statutory rate jurisdiction over Tri-State's wholesale rates, and § 40-7-111, C.R.S., precludes that rate jurisdiction.

47. A discussion of the Commission's jurisdictional sphere necessarily begins with Article XXV of the Colorado Constitution which states in relevant part:

> … all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility,

[9] The term "narrow issue" may be somewhat of a misnomer. While the issue is narrow, the analysis is broad and requires an examination of Colorado Public Utilities Law, the Rural Electrification Act (REA), the Federal Power Act (FPA), and the Commerce Clause.

[10] Indeed, if no state authority exists for Commission jurisdiction over the Complaint, the analysis concludes with dismissal of the Complaint which vitiates the need to delve deeper into the federal issues surrounding Commission jurisdiction.

> as presently or may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

48. Pursuant to § 40-3-102, C.R.S., the legislature has vested the authority contained in Article XXV to the Commission. That statute provided in relevant part as follows:

> The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power …

It is evident that the General Assembly intended to place the primary duty and responsibility for the determination of just and reasonable utility rates with the Commission, and provided a complete procedural structure in the Colorado Public Utilities Law for the Commission to follow in discharging its function. *Pub. Utils. Comm'n v. Northwestern Water Corp*., 451 P.2d 266 (1969).

49. The primary purpose of utility regulation is to ensure that the rates charged by utilities are not excessive or unjustly discriminatory. *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981). As such, the Commission has been charged with the general responsibility to protect the public interest regarding utility rates and practices. *Consolidated Freightways Corp. v. Pub. Utils. Comm'n*, 406 P.2d 83 (1965). This public interest charge has been defined as protecting the interests of the general public from excessive or burdensome rates. *Pub. Utils. Comm'n. v. District Court*, 572 P.2d 233 (1974).[11] Unquestionably, the Commission

[11] Section 40-3-101(1), C.R.S. prohibits and finds unlawful "every unjust and unreasonable charge made, demanded, or received for such rate, fare, product or commodity or service …"

is endowed with broad regulatory and ratemaking authority and is required to discharge those duties when required to do so.

50. While Tri-State concedes it is a "public utility" under Colorado law,[12] it nonetheless disputes that it is subject to the Commission's rate jurisdiction. It challenges Complainants' claim that § 40-6-111, C.R.S., is applicable here since it can find no regulatory requirement under which Tri-State must file its rates with the Commission. Tri-State specifically points to § 40-6-111(1)(a), C.R.S., which requires that "… there [must be] filed with the [C]ommission any tariff or schedule stating any new or changed individual or joint rate …" in order for the Commission to have jurisdiction either pursuant to a complaint or on its own initiative. According to Tri-State's reasoning, because § 40-6-111, C.R.S., requires that a tariff or schedule be filed, and because Commission regulations do not require it to file its rates or tariffs with the Commission (*see*, Rule 3000(c)), there can be no Commission jurisdiction over its rates.

51. Complainants, however, rely on § 40-6-111(4)(a), C.R.S., which states in relevant part:

> Notwithstanding any other provision of law, no cooperative electric association shall establish, charge, or collect a discriminatory or preferential rate, charge, rule, or regulation which would be violative of section 40-3-106 (1) or
> section 40-3-111

According to Complainants, this statutory provision unequivocally expresses a state interest in investigating rates of a G&T that are claimed to be discriminatory or improper.

52. The canons of statutory construction have been cited and re-cited so often as to be they are nearly axiomatic. Statutes concerning the same subject matter are to be read together as

[12] Hrg. Exh. No. 3 – Answer Testimony and Exhibits of Tri-State witness Daniel T. Walker.

much as possible in order to give effect to the legislative intent and it must be presumed that the general assembly intended a just and reasonable result. *See*, § 2-4-201, C.R.S.; *Avicomm, Inc., v. Colo. Pub. Utils. Comm'n*., 955 P.2d 1023 (Colo. 1998). Statutes should be interpreted, if possible, to harmonize and give meaning to other potentially conflicting statutes. *Ragsdale Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo. App. 1987). A statute must be construed to further the legislative intent evidenced by the entire statutory scheme. *Martinez v. Cont'l. Enters*., 730 P.2d 308 (Colo. 1986). When construing statutes, determination and effect must be given to the intent of the legislature, and a statutory construction must be adopted that best effectuates the purposes of the legislative scheme. *City and County of Denver v. Gonzales*, 17 P.3d 137 (Colo. 2001).

53. Section 40-6-111(4)(a), C.R.S., was crafted by the legislature in a manner to make the Commission's suspension of rate powers inapplicable to cooperative electric associations, while nevertheless leaving those public utilities subject to the other provisions of not only that section, but also the relevant rate jurisdiction provisions of the Public Utilities Law. *Colorado-Ute Electric Association, Inc., v. Pub. Utils. Comm'n*, 760 P.2d 627, 637 (1988). The statute expressly provides that subsection (4) is not to be construed to exempt cooperative electric associations from any other provision of § 40-6-111, C.R.S., including conducting a hearing regarding the propriety of a newly filed rate or changed rate upon complaint or on the Commission's own initiative. *Id*. (referring to §§ 40-6-111(1) and (2)(a), C.R.S.). Therefore, cooperative electric associations are exempt only from the power of the Commission to suspend a tariff, which provides a harmonious and consistent effect to the statute's provisions. *Id*.

54. The language of § 40-6-111(4)(a), C.R.S., precludes cooperative electric associations from establishing, charging, or collecting discriminatory or preferential rates which

would not only violate § 40-6-111, C.R.S., but also § 40-3-106(1), C.R.S. Notably, § 40-3-106(1), C.R.S., does not contain a requirement that a rate considered under that section must have been previously filed with the Commission. But most importantly, it is apparent that the legislature provided a clear avenue for members or customers of electric cooperative associations to seek relief for any rate violations pursuant to either of those two statutory provisions.

55. Further, incorporating §§ 40-6-108(1)(a) and (b), C.R.S. (the Commission's primary complaint procedure statute) into the interpretation of Commission rate jurisdiction with §§ 40-6-111(1) and (4)(a), C.R.S., it becomes apparent that not only are these provisions consistent with each other, but the last sentence of § 40-6-111(4)(a), C.R.S., in effect lessens the requirements of § 40-6-108(1)(b), C.R.S., which requires that a complaint as to the reasonableness of any rates or charges of an electric utility must be signed by not less than 25 customers or prospective customers of the public utility, which in turn, as stated *supra*, eases the regulatory burden on cooperative electric associations. *Colorado-Ute Electric Association, Inc.* at 637. This interpretation is further augmented by § 40-6-110, C.R.S., which provides that "[a]ny public utility has a right to complain on **any grounds** upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases." (Emphasis added).

56. Reading those statutes together, along with § 40-3-102, C.R.S., nothing can be ascertained which would diminish any of the Commission's jurisdictional powers under Public Utilities Law to investigate tariff changes and, if necessary, to prescribe just and reasonable rates

as applicable to Tri-State.[13] Consequently, it is found that the Public Utilities Law and specifically the statutory provisions cited above (and harmonized) provide the Commission with state jurisdiction over Tri-State's rates. Based on those findings, it is also held that Complainants have standing to bring Claim Three based on alleged violations of § 40-3-101 and § 40-3-111, C.R.S., and Claim Four based on alleged violations of § 40-3-106(1) and § 40-3-111(1), C.R.S., of the Complaint.

57. Tri-State takes the position that the Commission has recognized for nearly 40 years that it does not exercise ratemaking jurisdiction over Tri-State. In support of that contention, Tri-State cites several Commission decisions which purport to establish the Commission's policy regarding Tri-State's rates. It also points out that the Commission has chosen not to promulgate rules requiring Tri-State to file its rates with the Commission and in fact has promulgated rules excluding cooperative electric G&T associations from the application of its tariff and rate rules.

58. Complainants, however, argue that none of the cases cited by Tri-State address the specific question of whether the Commission has jurisdictional authority to hear a complaint brought by Tri-State member systems alleging Tri-State's rates are discriminatory. Complainants maintain that statements in prior Commission decisions regarding the scope of Commission rate regulation over Tri-State are more likely an indication that the Commission acknowledges that it regulates Tri-State very differently from the investor-owned utilities (IOUs) in the state. Complainants assert that there is no basis to read into any of those Commission decisions, an

[13] Section 40-6-111(4)(a), C.R.S., provides that the Commission shall, upon complaint filed by any member or customer of a cooperative electric association, determine whether the rate or charge in question is contrary to this section, § 40-3-106(1), or § 40-3-111, C.R.S.

affirmative conclusion that the Commission has disclaimed jurisdiction to hear a lawfully filed complaint that Tri-State's rates are discriminatory.

59. Due to the legislative nature of ratemaking, the Commission is not bound by *stare decisis*. *Colo.-Ute* at 639. Nonetheless, Commission prior decisions are entitled to deference and are to be accorded great weight. *B & M Service, Inc. v. Pub. Utils. Comm'n*., 429 P.2d 293, 295 (Colo. 1967) (*citations omitted*) (finding that although past Commission decisions should be given great weight, the Commission could change its position and the mere fact that it is inconsistent with at least one prior decision does not render it arbitrary, unlawful, unreasonable, or capricious).

60. A review of the decisions cited by Tri-State reveals that each addresses a discrete issue unrelated to Commission jurisdiction to hear a complaint regarding Tri-State's rates. For example, in Decision No. 86499 issued March 18, 1975, the Commission considered an application by Tri-State to issue securities for the construction of infrastructure. There, the Commission relied on the bright line test articulated in *Pub. Utils. Comm'n. of Rhode Island v. Attleboro Steam and Electric*, 273 U.S. 83 (1926) in determining it did not have authority to approve the issuance of securities sought by Tri-State.

61. In Decision No. C02-793, Proceeding No. 02R-137E issued July 22, 2002, the issue involved proposed amendments to the Commission's Electric Integrated Resource Planning Rules. There, the Commission made a conclusory statement without analysis that it did not have rate authority over Tri-State so it was inappropriate to subject it to the competitive resource acquisition requirements.

62. In Decision No. C06-0657, Proceeding No. 05M-375E issued June 6, 2006, Pubic Service Company of Colorado's Petition to Open a Docket to Consider Revisions to the

Commission's Electric Least Cost Resource Planning Rules, the Commission, relying on the statement in Decision No. C02-793 again stated that it did not have rate authority over Tri-State. Again, the statement was without supporting analysis as to the Commission's reasoning.

63. In Decision No. R99-891, Proceeding No. 99A-196E issued August 12, 1999, the ALJ found that the Commission should not interfere with a merger of Tri-State with Plains Electric Generation and Transmission Cooperative located in New Mexico. The ALJ determined that the transaction was in interstate commerce and therefore beyond the jurisdiction of the Commission. The ALJ also distinguished *Arkansas Electric Cooperative v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) from that particular transaction in that Tri-State was not similar in basic operation to the Arkansas utility, and anything done in the merger application would not be incidental to interstate commerce, but would directly interfere with it.[14]

64. The prior Commission cases cited by Tri-State clearly deal with matters other than whether a member system may bring a complaint based on Tri-State's rates to the Commission. As indicated *supra*, the various issues addressed by the Commission did not squarely address the matter at hand.[15] That the Commission determined that it did not have jurisdiction over Tri-State's rates appear to be mostly incidental to its ultimate findings on other issues in those proceedings. Consequently, it is not necessary to use those prior Commission decisions as precedent in this matter, and failing to do so does not render this decision arbitrary, unlawful,

[14] While Tri-State uses these prior Commission decisions as support for its position that the Commission does not possess jurisdiction to hear this Complaint, regarding Decision No. 86499 and in Proceeding No. 99A-196E, Tri-State must have believed the Commission did have jurisdiction to decide its application to issue securities and to approve its application to merge with Plains Electric Generation and Transmission Cooperative located in New Mexico, or it would not have sought Commission approval in the first instance.

[15] *See*, Hearing Transcript, Vol. 2, 7/30/13, 200:4 – 201:24, Spiers cross-examination

unreasonable, or capricious. Further, the outcome of those prior Commission decisions does not affect the analysis above of Commission jurisdiction based on Colorado Public Utilities Law.

65. The finding regarding Commission jurisdiction pursuant to Colorado Public Utilities Law is buttressed by the fact that federal rate regulation of Tri-State leaves a significant regulatory gap in which the Commission is required and is permitted to assert jurisdiction.

66. It is understood that the Federal Energy Regulatory Commission (FERC) regulates the interstate wholesale electricity market through rate regulations pursuant to the Federal Power Act (FPA) which requires utilities to charge "just and reasonable rates." *16 U.S.C. § 824d(a)*. The FPA granted FERC the exclusive authority to enforce this provision by regulating the rates, terms, and conditions governing the interstate transmission and sale of wholesale energy in interstate commerce. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). However, while the FPA generally grants FERC exclusive jurisdiction over the regulation of wholesale power, FERC lacks jurisdiction over utilities that are regulated by the Rural Electrification Administration (REA) under the Rural Electrification Act (RE Act), the predecessor agency to the Rural Utilities Service (RUS), the agency charged with promoting rural electrification by providing loans for infrastructure development. *Northeastern Rural Electric Membership Corp. v. Wabash Valley Power Association, Inc.*, 707 F.3d 883 (7th Cir. 2013). Importantly, different from FERC, the RUS does not have exclusive jurisdiction over the regulation of wholesale electric rates, which provides the states with a jurisdictional avenue to regulate wholesale power companies which are financed by the RUS. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383-84 (1983).

67. The FPA empowered FERC to regulate rates and services for interstate transmission and wholesale sales by entities not specifically exempted, while leaving local

distribution and purely intrastate transmission to state regulators. *16 U.S. C. § 824(b)*. FERC's broad authority over interstate transmission and sales is apparent. However, FERC has relinquished jurisdiction when an electric cooperative receives financing under the RE Act. *16 U.S.C. 824(f)* as is the case with Tri-State.[16]

68. As a result, Tri-State's rates are regulated by the RUS pursuant to 7 *Code of Federal Regulations* (CFR) 1717.300, *et seq*.[17] Because the RUS makes and guarantees loans to rural electric cooperatives such as Tri-State, it requires them to "charge rates for the sale of electric power and energy which are sufficient to pay the principal and interest on loans made or guaranteed by RUS in a timely manner and to meet the requirements of the RUS wholesale power contract and other RUS documents." *Id*. at 301(b). Further, the RUS recognizes that since it does not require that cooperative electric utilities that have loans or guarantees through the RUS to ensure that their rates are just and reasonable, there is room for state rate regulation of wholesale rates. As such, the RUS will only pre-empt a state's jurisdiction over rates where the RUS Administrator "has determined that such [state] jurisdiction has compromised Federal interests, including … the ability of the borrower to repay its secured loans in accordance with the terms of the RUS documents." *Id*. at 301(b) through (e).

69. The RE Act clearly does not expressly empower or authorize the Administrator Secretary to pre-empt the jurisdiction of a state regulatory agency or to regulate the rates of a power supply borrower except in narrow circumstances. Nothing exists in the RE Act that expressly pre-empts state rate regulation of a power cooperative financed by the REA. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 385-386. Rather, "the REA is

[16] *See*, Tri-State's Motion to Dismiss Formal Complaint, pp. 10-11.
[17] Hearing Exhibit No. 54.

a lending agency rather than a classic public utility regulatory body in the mold of either FERC or the Arkansas PSC." *Id.*

70. In reviewing the Congressional history of the RE Act, the Court noted that "the legislative history … makes abundantly clear … that although the REA was expected to play a role in assisting the fledgling rural power cooperatives in setting their rate structures, it would do so within the constraints of existing state regulatory schemes." *Id.* at 386 (Congressional history omitted).

71. Given the lack of federal oversight over the wholesale rates of Tri-State, it is incumbent upon the Commission to utilize its authorized jurisdiction to investigate claims that the company's rates may be unjust, unreasonable, or discriminatory.

72. Despite the finding of jurisdiction to hear this Complaint under Public Utilities Law, as Tri-State correctly observes, § 40-7-111, C.R.S., requires, in relevant part, that "[n]one of the provisions of articles 1 to 7 of [title 40] except when specifically so stated, shall apply or be construed to apply to commerce among the several states, except insofar as the same may be permitted under the provisions of the constitution of the United States and the acts of congress."

B. Commerce Clause

73. As indicated *supra*, the U.S. Constitute reserves to Congress the power to regulate commerce among the several states. The dormant Commerce Clause applies when a state, in the absence of any pre-empting federal action, passes a law or engages in conduct which interferes with interstate commerce.

74. Tri-State argues that regulation of its wholesale rates will have the "practical effect" of controlling conduct beyond Colorado's borders so that any Commission regulation of its rates would be a *per se* violation of the Commerce Clause. Tri-State argues that a *per se*

violation of the Commerce Clause occurs if a state's actions have the "practical effect" of controlling conduct beyond the state's borders. *Citing, American Booksellers Foundation v. Dean*, 342 F.3d 96, 104 (2nd Cir. 2003).

75. Complainants, on the other hand, argue that Tri-State cannot use the Commerce Clause to pre-empt Colorado law and Commission jurisdiction over the Complaint because the federal government, exercising its power under the Commerce Clause, specifically reserved for the states, rate authority over cooperative electric associations such as Tri-State. As a result, Complainants argue that a balancing test must be employed to determine whether any legitimate state interests are present which outweigh any burden on interstate commerce.

76. A *per se* violation of the Commerce Clause involves a state law which overtly blocks the flow of interstate commerce at a state's border. *City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 623-24 (1978). This is the clearest example of state legislation which effects simple economic protectionism. *Id*. However, "where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach. *Id.,* citing *Pike v. Bruce Church*, *Inc*., 397 U.S. 137, 142 (1970):

> Where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits … If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Therefore, a crucial inquiry is to determine whether the state action is basically a protectionist measure, or whether it can be fairly viewed as a law directed to legitimate local concerns, with

effects upon interstate commerce that are only incidental. *City of Philadelphia*, 437 U.S. at 625 *supra*.

77. It is undisputed that Tri-State operates in interstate commerce. It has member systems to which it provides wholesale electricity sales in four states including Wyoming, Colorado, New Mexico, and Nebraska. (Hrg. Exh. 2 Answer Testimony and exhibits of Michael S. McInnes). Those member systems in turn serve approximately 1.5 million consumers. (Hrg. Exh 6 Answer Testimony and exhibits of Daniel M. Walker). Tri-State's member systems provide retail electric service extending into Arizona, Montana, and Utah. *Id*.

78. Tri-State's generation resources including baseload, intermediate, and peaking resources located in Arizona, Colorado, New Mexico, and Wyoming. (Hrg. Exh. 3 Answer Testimony and exhibits of Daniel T. Walter) Tri-State also purchases and sells large quantities of power to and from other entities located throughout the western United States which is transmitted through both the Western and Eastern Interconnections, including the Western Area Power Administration, Public Service Company of Colorado, the Salt River Project, PacifiCorp, Basin Electric, Shell Energy North America, and several renewable energy companies. (Hrg. Exh. 8 Answer Testimony and exhibits of Joseph P. Kalt)

79. Based on that evidence and referring to *New York v. Federal Energy Regulation Commission*, 535 U.S. 1 (2002), which finds that "transmissions on the interconnected national grids constitute transmissions in interstate commerce," *Id*. at 16 since Tri-State is engaged in interstate commerce, it argues that any attempt at rate regulation by the Commission will result in a *per se* violation of the Commerce Clause.

80. It is well-established that with the exception of Hawaii, Alaska, and Texas, "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is

constantly moving in interstate commerce." *Id*. at 7. *See also, FPC v. Florida Power & Light Co*. 404 U.S. 453, 469 (1972). However, this is true for not only Tri-State, but also for the IOUs in Colorado as well. Despite the understanding that the electricity generated by those IOUs moves in interstate commerce the instant electrons are injected into the grid, they are nonetheless not so intertwined in interstate commerce as to exempt them from Commission jurisdiction over their retail rates.

81. Tri-State's argument that given the interstate character of its cooperative system any Commission assertion of rate authority will result in a *per se* violation is less than convincing given the fact that Congress made way for state regulation of Tri-State's wholesale rates. Indeed, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985). (Addressing dormant Commerce Clause question whether an individual state acting entirely on its own authority would run afoul of the dormant Commerce Clause if it sought to comprehensively regulate acquisitions of local banks by out-of-state holding companies).

82. As was discussed *supra*, FERC has ceded jurisdiction over rural cooperative electric associations such as Tri-State to the RUS because Tri-State obtains loans or receives guarantees for certain loans from the RUS (16 USC § 824(f)). In turn, the RUS has clearly made accommodations for state regulation of the wholesale rates of those cooperative electric associations such as Tri-State (7 CFR § 1717.300, *et seq*.) It is apparent then that state jurisdiction over a cooperative such as Tri-State is permitted by federal law. Since the RUS has made room for regulation of Tri-State's rates by this Commission, it appears that there can be no attack on that authorization pursuant to the Commerce Clause.

83. Tri-State attempts to demonstrate that any rate regulation by the Commission would necessarily require full rate regulation including the filing of its rates and a hearing on the rates' propriety. As a result, Tri-State argues that because its load and resources must always be in balance, and because its current interstate system allows load and resources to balance across the entirety of the Tri-State system, any rate regulation would likely create a situation where it cannot schedule New Mexico and Wyoming generation resources throughout its interstate system to serve load, for example, in Colorado.

84. In addition, Tri-State maintains that a revision to its A-37 rates would change power consumption behavior of its member systems in Colorado so that its integrated multi-state system would be dispatched differently and less optimally across all Tri-State's service area. Tri-State goes on to state that Colorado, New Mexico, and Wyoming have competing interests in ensuring that wholesale rates charged in their respective states are the lowest in the Tri-State system, which could lead to a disallowance of full cost recovery for Tri-State.

85. Tri-State's concerns regarding the full rate regulation it assumes would be asserted by the Commission here are speculative at best. Tri-State provides no evidence to the record that this has occurred in the past. Additionally, Tri-State witness Mr. Corrigan testified on cross-examination that Tri-State's system would actually not be dispatched differently if there is a cost-based differential based on two separate rates in two states:

> Q: Let me start off with a new question here. So are you agreeing with me that if there is a cost-based differential driving the fact that there are two rates, that regardless of the fact that there are two rates, Tri-State will still operate the integrated system as a whole so as to minimize the system costs to the membership as a whole; is that correct?
>
> A: That is correct.

Tri-State also argues that the Commission could not assert limited regulation as requested by Complainants, as it must assert its full regulatory authority when required. However, as the court found in *Colorado-Ute Elec. Ass'n, Inc.* the determination as to how to regulate rates lies squarely within the discretion of the Commission.

86. As a result, it is found that the Commerce Clause issues raised by Tri-State are not available to it since Congress has provided an avenue for state regulation over Tri-State's wholesale interstate rates. Notwithstanding Tri-State's claims of full rate regulation, the question here is merely one of Commission jurisdiction to hear the Complaint. Because state public utilities law provides for Commission jurisdiction over Tri-State's wholesale rates, and because there is no violation of the Commerce Clause by asserting that jurisdiction, it is found that the Commission has jurisdiction to hear this Complaint.

87. Tri-State cites several decisions for the proposition that Commission jurisdiction here would result in a *per se* invalidity under the Commerce Clause even without a direct burden on interstate commerce if a state's actions have the "practical effect" of controlling conduct beyond the state's borders.[18] However, it does not appear that in any of those cited cases, a federal statute or regulation existed which provided the underlying local regulatory agency with authority to regulate rates as exists here. In addition, as explained *supra*, Tri-State's assumptions regarding the degree to which the Commission may assert rate regulation is merely speculative and premature at this point.

[18] *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986); *Healy v. Beer Institute*, 491 U.S. 324 (1989); *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003); *TeleTech Sys., Inc. v. Barbour*, 866 F. Supp. 2d 571 (S.D. Miss. 2011).

88. Further, under an analysis of the balancing test articulated in *Pike v. Bruce Church*, 397 U.S. at 142, when "a statute regulates even-handedly to effectuate a legitimate local public interest, and its effect on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." There is simply no concrete evidence to determine that Commission jurisdiction to hear the Complaint will be excessive in relation to ensuring that Tri-State's rates are just, reasonable, and non-discriminatory. The bulk of the testimony offered by Tri-State is based on Tri-State's assumption that any regulation by the Commission would necessarily be full rate regulation similar to IOU rate regulation in Colorado.

89. However, as indicated *supra*, there is no reason to believe that the Commission would adopt a policy to rate regulate Tri-State in that manner. Further, much weight must be given to the fact that the RUS has provided a place for Commission jurisdiction over Tri-State's rates, recognizing that states have an important public interest regarding rate regulation. This weight clearly tips the *Pike* balancing test towards finding that the existence of those putative local benefits outweigh any burden on interstate commerce, which as also indicated *supra*, is at this point speculative at best.

C. Standing of Industrial Complainants

90. Tri-State seeks to dismiss the Industrial Complainants from the Complaint. Tri-State argues that it exclusively provides wholesale service to its member systems that in turn provide retail electric service to their Industrial Complainant customers. In addition, Tri-State states that the notice of rate change applied only to the wholesale rates charged to its member systems, and those member systems set their own rates independently of Tri-State and provide such notice to their own customers, such as the Industrial Complainants. Tri-State concludes that

the Industrial Complainants are complaining about the retail rates charged by their respective member systems which are not before the Commission in this proceeding. Therefore, the Industrial Complainants should be dismissed from this proceeding since their true complaint lies with the retail rates they are being charged by the member systems which provide retail electric service to them.

91. Complainants argue that all member-customers must purchase electricity from the member systems in whose territory the customer resides. Consequently, any rate increase imposed by Tri-State will be passed on to the member-customers, including the Industrial Complainants, who will in turn, be required to pay the discriminatory and unjust rate. In the alternative, Complainants assert that even if the Industrial Complainants lack standing, if the cooperative Complainants have standing, then the Complaint could move forward with the Industrial Complainants as intervening parties.

92. As typically found by the Commission in previous standing questions, standing is a threshold question of law. *Board of County Commissioners of La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 1119, 1122 (Colo. App. 2003).

93. A two-part test is applied to resolve the issue of standing. The first prong of the test is whether the party seeking relief alleges an injury-in-fact. The second prong of the test is whether the alleged injury is to a legally protected or cognizable interest. *Douglas County Board of Commissioners v. Pub. Utils. Comm'n*, 829 P.2d 1301, 1309 (Colo. 1992). The Industrial Complainants bear the burden of proof that they have standing to participate as Complainants in this case.

94. Section 40-6-108(1)(d), C.R.S., provides that the Commission "is not required to dismiss any complaint because of the absence of direct damage to the complainant."

This provision directly relates to the first prong of the standing test and permits the Commission, should it choose, to hear a complaint even in the absence of direct harm to a complainant. The Industrial Complainants must also establish they have a legally protected or cognizable interest in the subject matter of the proceeding.

95. Here, the Industrial Complainants argue that the wholesale rates in fact will be passed on to them since the member systems must closely mirror wholesale rates to both ensure they fully recover their costs and do not create inappropriate cross-subsidies between their various member-consumers. Further, due to the long-term power supply contract in place between Tri-State and its member systems, Tri-State's members have no other alternative from whom to purchase their power supply and cannot decide to purchase their power supply elsewhere.

96. The first prong of the standing test is met by virtue of § 40-6-108(1)(d), C.R.S. The second prong of the test relating to a legally protected or cognizable interest is met as well. Certainly, the wholesale rates charged to the member systems are passed on to Tri-State's member system's customers, including the Industrial Complainants. Because it is found that the rate increases constitute a cognizable interest, Industrial Complainants have standing as complainants in this proceeding.

III. ORDER

A. It Is Ordered That:

1. The Motion of Tri-State Transmission and Generation Association to Dismiss Formal Complaint is denied consistent with the discussion above.

2. BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, and ExxonMobil Power and Gas Services Inc., on behalf of

ExxonMobil Production Company, a division of ExxonMobil Corporation; and Kinder Morgan CO_2 Company, L.P. have standing as Complainants in this Complaint proceeding consistent with the discussion above.

3. This Interim Decision is certified as immediately appealable to the Commission *en banc* pursuant to 4 *Code of Colorado Regulations* 723-1-1502(d).

4. This Decision is effective immediately.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge